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Abdul Rahman bin Usof & Ors v RHB Trustees Bhd (trustees to Linggiu Valley Orang Asli (JAKUNS) Trust)

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-2583–07 OF 2024
GAN TECHIONG JC
28 APRIL 2025

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Trusts and Trustees — Duties — Fiduciary duty — Trustees without knowledge of beneficiaries of trust obtained ex parte court order to appoint property agent to sell trust properties below market value — Trustees further agreed to allow property agent to deduct and keep from total sale price more than RM7.6m as their 'upgrade and renovation costs' in addition to maximum allowable commission for the sale — Whether trustees had acted to the detriment of the trust in breach of their fiduciary duties — Whether beneficiaries were entitled to set aside the impugned ex parte order for sale

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The 65 Orang Asli applicants in this action ('the applicants') were beneficiaries under a trust known as the Linggiu Valley Orang Asli (Jakuns) Trust. The respondent was appointed by the court as trustee to manage the trust after the applicants received a net amount of RM22m from the Government as compensation for the compulsory acquisition of their ancestral lands. The applicants filed the instant action after discovering that the respondent had, without their knowledge, obtained an ex parte order from court ('the impugned order for sale') to allow a property agent ('JBP') to sell 57 condominium units belonging to the trust on 'highly abnormal' terms and conditions set by JBP. The terms included that JBP would be paid RM7,624,347.45 from the proceeds of sale as 'upgrade and renovation costs' that would purportedly be incurred on the condos. In addition, JBP was to be paid 3% commission on the total sale price of the properties. The applicants averred that the sale prices fixed for the condos were below market value. The applicants applied to set aside the impugned order for sale on the ground that, inter alia, the respondent had breached its fiduciary duties by not obtaining the prior consent of the beneficiaries to the sale of the trust properties and had acted to the trust's detriment by agreeing to the terms and conditions set by JBP. The respondent took the position that it was empowered by the trust deed to deal with the trust property in any manner it deemed fit.

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Held, setting aside the impugned order for sale:

(1) There was serious lack of probity on the part of the respondent. By agreeing to pay JBP the maximum allowable commission of 3% on the

sale price of the condos (the norm paid to property agents in Malaysia was a flat rate of RM1,000 per property) in addition to more than RM7.6m as 'upgrade and renovation costs', the respondent had acted to the detriment of the beneficiaries of the trust (see paras 24 & 29).

(2) The valuation report prepared by Messrs Jordan Lee and Jaafar showed that the condos were worth more than RM17m based on their then existing condition (ie without doing any repairs or renovation). Assuming that there was a real need to sell the condos, there was no evidence of the respondent having made any effort to sell the condos at the market price of RM17,120,000 as valued by Messrs Jordan Lee and Jaafar. The respondent appeared to have hurried along with its scheme to sell the properties with a dubious term to pay JBP more than RM7.6m as 'upgrade and renovation costs' without requiring JBP to give details of such work having been done. The schedule of sale of the condo units as annexed in JBP's letter to the respondent showed how JBP stood to be enriched at the expense of the trust (see paras 31–37).

(3) Even though after the filing of the instant action the respondent had applied to remove JBP's name from the impugned order for sale, the fact that the respondent had initially unequivocally agreed to the terms of sale set by JBP irreversibly damaged its credibility as a professional trustee for the trust. The agreement to pay JBP the massive sum of more than RM7.6m as 'upgrade and renovation costs' was wholly unjustifiable, a clear intention to deplete the trust of its assets and a breach of the respondent's fiduciary duty to protect the trust (see paras 38–39).

(4) The applicants were entitled to have the impugned ex parte order for sale set aside under O 32 r 6 of the Rules of Court 2012 ('the ROC') without being caught by the time limit for setting aside under O 42 r 13 of the ROC because the impugned order was never served on the applicants. The applicants had also satisfied the legal requirement for the setting aside of an inter partes order on the ground of intention to defraud and deplete trust assets (see paras 41–42, 45 & 49).

(5) The respondent did not have an unfettered power under cl 7.3 of the trust deed to sell the trust's properties as cl 7.3 had to be read subject to the trite principle that a trustee was a fiduciary who always had to act in the best interests of the beneficiaries of the trust (see para 50).

[Bahasa Malaysia summary

Enam puluh lima orang pemohon Orang Asli dalam tindakan ini ('pemohon-pemohon') merupakan benefisiari di bawah suatu amanah yang dikenali sebagai Amanah Orang Asli (Jakun) Lembah Linggiu. Responden telah dilantik oleh mahkamah sebagai pemegang amanah untuk mentadbir amanah tersebut selepas pemohon-pemohon menerima suatu jumlah bersih sebanyak RM22 juta daripada Kerajaan sebagai pampasan bagi pengambilan

secara paksa tanah-tanah adat nenek moyang mereka. Pemohon-pemohon telah memfailkan tindakan ini selepas mendapati bahawa responden, tanpa pengetahuan mereka, telah memperoleh suatu perintah ex parte daripada mahkamah ('perintah penjualan yang dipertikaikan') bagi membenarkan seorang ejen hartanah ('JBP') menjual 57 unit kondominium milik amanah tersebut atas terma dan syarat yang bersifat sangat tidak normal yang telah ditetapkan oleh JBP. Terma-terma tersebut termasuklah bahawa JBP akan dibayar sebanyak RM7,624,347.45 daripada hasil jualan sebagai 'kos naik taraf dan pengubahsuaian' yang kononnya akan ditanggung bagi kondominium-kondominium tersebut. Selain itu, JBP juga akan dibayar komisen sebanyak 3% daripada jumlah keseluruhan harga jualan hartanah-hartanah berkenaan. Pemohon-pemohon menegaskan bahawa harga-harga jualan yang ditetapkan bagi kondominium-kondominium tersebut adalah di bawah nilai pasaran. Pemohon-pemohon memohon supaya perintah penjualan yang dipertikaikan itu diketepikan atas alasan, antara lain, bahawa responden telah melanggar kewajipan fidusiari dengan tidak mendapatkan persetujuan benefisiari terlebih dahulu untuk penjualan harta amanah dan telah bertindak memudaratkan amanah dengan bersetuju kepada terma-terma dan syarat-syarat yang ditetapkan oleh JBP. Responden pula menghujahkan bahawa mereka diberi kuasa oleh surat ikatan amanah untuk mengurus dan melupuskan harta amanah dalam apa-apa cara yang difikirkannya sesuai.

Diputuskan, mengenepikan perintah penjualan yang dipertikaikan:

(1) Terdapat ketidakjujuran yang serius di pihak responden. Dengan bersetuju untuk membayar kepada JBP komisen maksimum yang dibenarkan sebanyak 3% daripada harga jualan kondominium-kondominium tersebut (sedangkan amalan lazim bayaran kepada ejen hartanah di Malaysia adalah pada kadar rata sebanyak RM1,000 bagi setiap hartanah), selain bayaran melebihi RM7.6 juta sebagai 'kos naik taraf dan pengubahsuaian', responden telah bertindak memudaratkan kepentingan benefisiari amanah (lihat perenggan 24 & 29).

(2) Laporan penilaian yang disediakan oleh Tetuan Jordan Lee dan Jaafar menunjukkan bahawa kondominium-kondominium tersebut bernilai melebihi RM17 juta berdasarkan keadaan sedia ada pada masa itu (iaitu tanpa sebarang pembaikan atau pengubahsuaian). Sekiranya benar terdapat keperluan sebenar untuk menjual kondominium-kondominium tersebut, tiada sebarang keterangan bahawa responden telah berusaha untuk menjualnya pada harga pasaran sebanyak RM17,120,000 sebagaimana yang dinilai oleh Tetuan Jordan Lee dan Jaafar. Sebaliknya, responden kelihatan telah tergesa-gesa melaksanakan suatu skim penjualan hartanah-hartanah tersebut dengan terma yang meragukan, iaitu membayar kepada JBP lebih daripada

RM7.6 juta sebagai 'kos naik taraf dan pengubahsuaian', tanpa meletakkan syarat kepada JBP untuk mengemukakan butiran terperinci mengenai kerja-kerja yang kononnya telah dilaksanakan. Jadual penjualan unit-unit kondominium sebagaimana yang dilampirkan dalam surat JBP kepada responden menunjukkan dengan jelas bagaimana JBP berpotensi memperkayakan diri dari perbelanjaan amanah tersebut (lihat perenggan 31–37).

(3) Walaupun selepas pemfailan tindakan ini responden telah memohon supaya nama JBP dikeluarkan daripada perintah penjualan ex parte yang dipertikaikan, fakta bahawa responden pada peringkat awal telah secara jelas dan tanpa berbelah bahagi bersetuju dengan terma-terma penjualan yang ditetapkan oleh JBP telah menjejaskan kredibilitinya sebagai seorang pemegang amanah profesional bagi amanah tersebut. Persetujuan untuk membayar kepada JBP sejumlah wang yang sangat besar, iaitu melebihi RM7.6 juta sebagai 'kos naik taraf dan pengubahsuaian' adalah sama sekali tidak dapat dipertahankan, menunjukkan niat yang jelas untuk menghabiskan dan melupuskan aset amanah serta merupakan suatu pelanggaran kewajipan fidusiari responden untuk melindungi amanah tersebut (lihat perenggan 38–39).

(4) Pemohon-pemohon berhak untuk mendapatkan perintah ex parte yang dipertikaikan itu diketepikan di bawah A 32 k 6 Kaedah-Kaedah Mahkamah 2012 ('KKM') tanpa terikat kepada had masa bagi permohonan pengenepian di bawah A 42 k 13 KKM, memandangkan perintah yang dipertikaikan itu tidak pernah diserahkan kepada pemohon-pemohon. Pemohon-pemohon juga telah memenuhi keperluan undang-undang bagi pengenepian suatu perintah inter partes atas alasan niat untuk menipu dan menghabiskan aset amanah tersebut (lihat perenggan 41–42, 45 & 49).

(5) Responden tidak mempunyai kuasa mutlak dan tidak terbatas di bawah klausa 7.3 surat ikatan amanah untuk menjual harta-harta amanah kerana klausa 7.3 tersebut hendaklah dibaca tertakluk kepada prinsip mantap bahawa seorang pemegang amanah adalah suatu fidusiari yang sentiasa wajib bertindak demi kepentingan terbaik benefisiari amanah tersebut (lihat perenggan 50).]

Cases referred to

Cheah Wong Nyan and Cheah Sin Kee v Kalrm Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean Guan a bankrupt [1935] 1 MLJ 31 (refd)

Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd [2016] 2 MLJ 457, FC (folld)

PECD Bhd & Anor v AmTrustee Bhd and other appeals [2010] 5 MLJ 357, CA (folld)

A *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1, FC (refd)

Legislation referred to

Rules of Court 2012 O 20 r 11, O 32 r 6, O 42 r 13

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Rabia bt Abd Halim (with Siti Zabedah Kasim) (Rabia, Farihan & Sures) for the applicants.

Kenneth Koh (with Afiq Iskandar and Moo Jie Ying (Pupil-in-Chambers)) (Xavier & Koh Partnership) for the respondent.

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Gan Techiong JC:

INTRODUCTION

D **[1]** In Malaysia, we call our aborigines 'Orang Asli', which is an apt nomenclature as it means 'original people'. There is a long and chequered history behind this case which was filed by 65 Orang Asli who are beneficiaries of a trust. Their tribe, which is part of the Jakun Tribe, 'came into big money' about three decades ago. More facts, as are necessary for the determination of this action, shall be elucidated below.

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[2] Those 65 Orang Asli commenced this action to protect their interest upon discovering that the trustee of the trust has agreed to highly abnormal terms and conditions for the sale of trust properties. The trustee is RHB Trustees Bhd, whom they have rightly named as the respondent herein.

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[3] Various allegations are averred in the applicants' supporting affidavit affirmed by the sixth plaintiff Jasni bin Amat on behalf of the applicants; the most glaring one being a proposed sale of 57 condominiums held by the trust with an absurd condition that a property agent appointed by the respondent shall be receiving about RM7.6m out of the sale proceeds, purportedly as 'upgrade and renovation costs'.

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H **[4]** After reading the cause papers and hearing submissions by both counsel, I decided that this court ought to rule in favour of the applicants/Orang Asli. My reasons for allowing the applicants' application are as explained below.

BACKGROUND FACTS

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[5] The 65 applicants in this action are Orang Asli of the Jakun tribe who are beneficiaries of a trust known as the Linggiu Valley Orang Asli (Jakuns) Trust ('the Trust').

[6] There were earlier trustees appointed for the Trust but for the purpose of this case, only the conduct of the respondent RHB Trustees Bhd is relevant. The respondent was appointed vide a court order dated 10 March 2019 to be the trustee of the Trust.

[7] The applicants had a windfall in the 1990's when their ancestral land was acquired by the State Government of Johor and an award of RM26m was made by the court then.

[8] By the time the land acquisition award was affirmed after appeals, the sum received in year 2000 was more than RM38m, including interest on the principal sum. After payment of legal fees and some initial distribution to the Orang Asli, the Trust was set up with a balance sum of RM22m.

[9] There has been litigation over the past years involving past trustees and solicitors, creating a chequered history for the Trust. The factual matrix as to how the Trust ended up having 57 condominiums in Kuala Lumpur is irrelevant in this case. Here, it is sufficient just to mention that 53 units of those condominiums are in the development known as Lanai Gurney Corporate Suites and four units are within Gurney Heights, both of which are located in Mukim Setapak, Kuala Lumpur ('the 57 condos').

[10] The respondent had failed to render statements of accounts regularly to the applicants, ignoring numerous letters sent by the applicants' solicitors, which led to the applicants filing an action against the respondent in September 2022. In that civil suit, Roz Mawar Rozain JC (as Her Ladyship then was) ordered the respondent to furnish accounts and make payments. It is unnecessary here to delve into the details of the previous civil suit, save to note that the applicants had encountered difficulties earlier in obtaining information from the respondent about the Trust accounts, etcetera.

[11] On 7 January 2025, this court issued a discovery order upon the application of the applicants to require the respondent to provide a copy each of the sale and purchase agreements that the respondent had entered into for the sale of some of the 57 condos. The respondent has complied with the discovery order.

THE APPLICANTS' CLAIM

[12] The applicants aver that the respondent had acted dishonestly towards them ('tidak berkelakuan jujur kepada kami') as they heard that the respondent was attempting to sell all the 57 condos without informing them. According to the applicants, their solicitors Messrs Rabia, Farihan & Sures did a file search in court and discovered that the respondent had obtained an ex parte order for

A sale on 20 June 2023 vide an ex parte originating summons at the High Court at Kuala Lumpur OS No WA-24NCVC-1904–05 of 2023 ('OS No 1904').

[13] It was further highlighted by the applicants that they also discovered that the respondent had adduced a valuation report which shows the market price of the 57 condos to be RM17.12m and the force sale price to be RM11,984,000.

[14] Learned counsel for the applicants contends that the market valuation of RM17m and force sale price of RM12m were gross undervaluation of the 57 condos which are located within the city of Kuala Lumpur. They also averred that based on sale transactions in the two developments where the 57 condos are located, as shown in a Brickz Report, the market value of the 57 condos are higher than RM19m.

[15] It was also highlighted in the submissions of learned counsel for the applicants that the respondent had appointed only one property agent, namely Jeffrey Brandon Property ('the property agent'), to be the sole agent to sell all the 57 condos at the market price but with dubious terms and conditions, including the payment of a large percentage of the selling price to the property agent. The payment was stated as 'Upgrade and Renovation Costs' in the property agent's letter dated 15 December 2023 ('the property agent's letter').

[16] On 26 January 2024, two senior employees of the respondent signed at the bottom of the property agent's letter to confirm the appointment of the property agent (Jeffrey Brandon Property) and accepted the terms and conditions stated in the said letter.

[17] *The monies to be paid to the property agent*, as stated in the property agent's letter dated 15 December 2023 as 'Upgrade and Renovation Costs', added up to a whopping *RM7,624,347.45*.

[18] In the ex parte order for sale dated 20 June 2023 in OS No 1904 ('the impugned order'), it was stated as 'Kerja-kerja Pembaikan dan Penyelenggaraan' (which English translation should be repair and maintenance works) to be done in the 57 condos.

[19] The applicants strongly objected to the scheme which would result in the payment of more than RM7.6m out of the Trust's assets to the property agent. They alleged, inter alia, breach of fiduciary duties by the respondent in failing to obtain the beneficiaries' consent to sell all the 57 condos, agreeing to pay more than RM7.6m to the property agent, concealing the proposed sale, being negligent in its conduct and for refusing (earlier) to respond to repeated queries raised by the applicants who are beneficiaries of the Trust.

THE DEFENDANT'S POSITION

[20] Learned counsel for the defendant submitted that the deed of trust dated 5 June 2000 gives the respondent a free hand to sell the assets comprising the whole or any part of the trust fund. Reference was made to cl 7.3 which reads:

> of the powers of the authorities and discretions conferred by law, the Trustees shall have the following powers, authorities and discretions vested in it by any other provisions of this Deed, or by law authorized:
>
> a) *Generally deal with trust funds*: to sell, call in and convert into money, grant options or rights to purchase or otherwise deal with, dispose of, or transfer any item or assets comprising the whole or any part of the trust fund or otherwise held by the trustees under the terms of the Trust for such consideration and on such terms as in their discretion they deem fit;

[21] It was further submitted that the respondent wanted to liquidate the 57 condos in order to raise money to make distribution to the beneficiaries but was unable to sell the 57 condos.

[22] As for the appointment of the property agent to sell the 57 condos, it was submitted that the respondent had subsequently revoked the appointment and had on 11 November 2024 obtained an ex parte order, inter alia, to amend the impugned order and deleted the property agent's name therefrom.

[23] The gist of the respondent's position is that the respondent ought to be allowed to proceed based on the amended impugned order, and the applicants may sue the respondent for breach of trust thereafter.

ANALYSIS OF THE FACTS AND LAW

[24] After poring through the affidavits and submissions of learned counsel on both sides, I find evidence of serious lack of probity on the part of the respondent which is the sole trustee of the Trust.

[25] As pointed above, the property agent's letter was dated 15 December 2023, and two senior employees of the respondent signed at the bottom of it to confirm the appointment of the property agent in January 2024. Screenshots of relevant portions of the property agent's letter are pasted below:

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JBP JEFFREY BRANDON PROPERTY 311
E(3)1783
EJEN HARTA TANAH BERDAFTAR / REGISTERED ESTATE AGENT
No. 22, Jalan SS 22/7, Damansara Jaya, 47400 Petaling Jaya, Selangor Darul Ehsan.
Tel : 012-224 3778 Email : jeffreybrandonproperty@gmail.com Url : jeffreybrandonproperty.com.my
Ejen Harta Tanah E2995

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Date : 15/12/23
To : RHB TRUSTEES BERHAD

Dear Sir/Madam

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RE : LETTER OF APPOINTMENT - INSTRUCTION/EXCLUSIVE OPTION TO SECURE A PURCHASER(S)

I/We, JEFFREY BRANDON PROPERTY, hereby acknowledge receipt your instructions/exclusive option to secure a purchaser(s) for **fifty-three (53) condominium units within LANAI GURNEY CORPORATE SUITES & four (4) condominium units within GURNEY HEIGHTS** developed on Lot Nos. 200258 & 200257, held under Title Nos. Geran 75956 & 75955 respectively, both within Mukim of Setapak, District of Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur (hereinafter referred to as "**the said Properties**") on the following terms and conditions stated herein:

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IT IS HEREBY AGREED THAT THE FOLLOWING TERMS AND CONDITIONS SHALL APPLY:

1. The minimum **Selling Price** of the said Properties shall be **RINGGIT MALAYSIA TWELVE MILLION ONLY (RM 12,000,000.00).** The **Purchase Price** of the said Properties is increased with the addition of the **Upgrade and Renovation Costs** based on the **Sale Scheme** as stated in the **High Court Order for Sale.** The particulars of the said Properties are stated in **Annexure A** of this Letter of Appointment.

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[26] However, I note that the impugned order dated 20 June 2023 had already stated the name of the property agent ie Jeffrey Brandon Property, in para (e) therein, and to be authorised to receive money for 'Kerja-kerja Pembaikan dan Penyelenggaraan'. This is evidence that the respondent had in fact planned the scheme much earlier for the property agent to be receiving a large percentage of the future sale proceeds. It was not a case of the respondent seeking prior approval from the court to sell the 57 condos at market price and thereafter to choose and appoint property agents to seek purchasers to buy at the market price.

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[27] The fact that the 'Upgrade and Renovation Costs', stated in the property agent's letter to be paid to the property agent added up to a whopping *RM7,624,347.45* is shocking.

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[28] Over and above the massive 'Upgrade and Renovation Costs' of *RM7,624,347.45* which the respondent had agreed to be paid to the property agent, the respondent also agreed that the property agent would be paid a commission as high as 3% of the total sale price of all the 57 condos. This may seen from the screenshot of the relevant part of the property agent's letter, as follows:

"Agency's Commission"	means three (3%) per centum of the Purchase Price (excluding6% SST) in accordance with the Valuers, Appraisers and Estate Agents Act 1981.

[29] With respect, this court takes judicial notice that a rate of 3% of the sale price is higher than the market rate. 3% is in fact the maximum commission that property agents in Malaysia are allowed to charge. In fact, property agents in Malaysia are allowed to charge a flat rate of only RM1,000 per property. This information is the official portal of the Board of Valuers, Appraisers, Estate Agents and Property Managers of Malaysia, ie in the public domain (see https://lpeph.gov.my/fees). Here, the respondent had agreed to pay the maximum rate of commission to a single property agent who is being given exclusive rights to sell as many as 57 condominiums and who is also promised to receive more than RM7.6m as 'Upgrade and Renovation Costs'. The respondent was acting to the detriment of the beneficiaries of the Trust.

[30] Reverting to the massive 'Upgrade and Renovation Costs' of *RM7,624,347.45* which the respondent had agreed to be paid to the property agent, the following facts further proved the lack of probity on the part of the respondent as trustee.

[31] First, the property valuation report prepared by Messrs Jordan Lee & Jaafar, which shows the 57 condos to be worth more than RM17m, was based on their existing condition, meaning no renovation was required. The valuer clearly stated 'in its existing condition', ie without having to do any repairs or renovation. A screenshot of the relevant part of the valuation report that shows the valuation of over RM17m is pasted below:

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Taking into consideration all relevant factors, we are of the opinion that the present Aggregate Market Value of the Premises, **as a bulk unit / single-entity**, being 53 condominium units within Lanai Gurney Corporate Suites and 4 condominium units within Gurney Heights Condominium, held under the respective strata titles as tabulated under **Schedule I,** all developed on Lot Nos. 200258 & 200257, held under Title Nos. Geran 75956 & 75955, both within Mukim of Setapak, District of Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, together with the other improvements therein, bearing postal address, (The respective Unit Nos.), Lanai Gurney Corporate Suites / Gurney Heights Condominium, Jalan Bukit Keramat, 54000 Kuala Lumpur, in its existing condition, free from all encumbrances and with vacant possession is **RM17,120,000/- (RINGGIT MALAYSIA : SEVENTEEN MILLION ONE HUNDRED AND TWENTY THOUSAND ONLY).**

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[32] Assuming that there is a real need to sell the 57 condos, there is no evidence of the respondent having made any efforts to sell the 57 condos, at least at the market price of RM17.12m as valued by Messrs Jordan Lee & Jaafar. The respondent appeared to have hurried along with its scheme to sell the 57 condos which included a dubious term to pay 'Upgrade and Renovation Costs' of over RM7.6m to the property agent — without requiring the property agent to give any details whatever of 'upgrade and renovation' that are to be performed!

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[33] The absurdity of the respondent's agreeing to pay 'Upgrade and Renovation Cost' to the property agent is best illustrated by the figures shown in the computation marked as Annexure A of the property agent's letter. I shall refer to two examples out of the 57 condos to highlight the figures. A screenshot of the unit E-20–2 in Item No 21 of Annexure A is pasted below:

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ANNEXURE A

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LANAI GURNEY CORPORATE SUITES

NO.	UNIT NO.	PURCHASE PRICE (JBP)	SELLING PRICE (RHBT)	UPGRADE & RENOVATION COST
21	E-20-2	404,993.39	263,328.92	141,664.46

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[34] The above screenshot for unit E-20–2 in Item No 21 of Annexure A shows that the purchaser shall pay the market price of RM404,993.39 (as valued by the valuer) but the Trust shall only be receiving RM263,328.92 because *RM141,664.46 is the so-called 'Upgrade and Renovation Cost' to be paid to the property agent*. The Trust will actually receive less than RM263,328.92 for this unit because as highlighted in para 28 above, the respondent has also agreed to allow the property agent to take 3% of the full purchase price of

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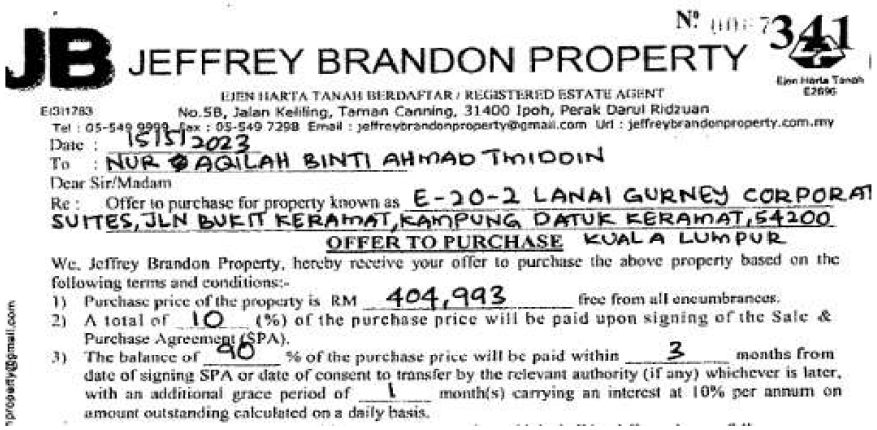
RM404,993.39, and there would be legal fees payable as well for the sale of this unit E-20–2. A

[35] There is no doubt that the actual sale price is RM404,993.39 (as valued by the valuer) because there is evidence from the sale document signed between the respondent (as vendor) and the purchaser for this unit E-20–2. A screenshot of it is pasted below: B



JB JEFFREY BRANDON PROPERTY

No: 7341

EJEN HARTA TANAH BERDAFTAR / REGISTERED ESTATE AGENT

E(3)1783 No.5B, Jalan Keliling, Taman Canning, 31400 Ipoh, Perak Darul Ridzuan

Tel : 05-549 9999 Fax : 05-549 7398 Email : jeffreybrandonproperty@gmail.com Url : jeffreybrandonproperty.com.my

Date : 15/5/2023

To : NUR AQILAH BINTI AHMAD TMIDDIN

Dear Sir/Madam

Re : Offer to purchase for property known as E-20-2 LANAI GURNEY CORPORAT SUITES, JLN BUKIT KERAMAT, KAMPUNG DATUK KERAMAT, 54200 KUALA LUMPUR

OFFER TO PURCHASE

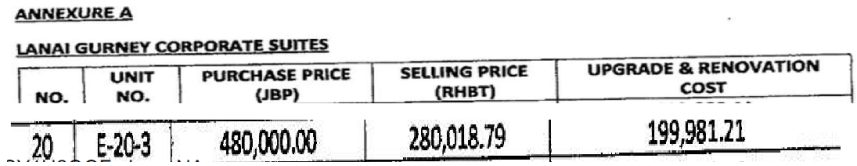
We, Jeffrey Brandon Property, hereby receive your offer to purchase the above property based on the following terms and conditions:-

1) Purchase price of the property is RM 404,993 free from all encumbrances.
2) A total of 10 (%) of the purchase price will be paid upon signing of the Sale & Purchase Agreement (SPA).
3) The balance of 90 % of the purchase price will be paid within 3 months from date of signing SPA or date of consent to transfer by the relevant authority (if any) whichever is later, with an additional grace period of 1 month(s) carrying an interest at 10% per annum on amount outstanding calculated on a daily basis.

jeffreybrandonproperty@gmail.com

C D E

[36] Similarly, for the sale of a unit known as E-20–3, the respondent had agreed to enrich the property agent at the expense of the Trust. A screenshot pasted below of the relevant part of Annexure A (part of the property agent's letter agreed to by the respondent) shows actual sale price of RM480,000 but with the Trust to be receiving only RM280,018.79 because the respondent has agreed for the property agent to be paid as much as *RM199,981.21* as 'Upgrade and Renovation Cost'! F G



ANNEXURE A

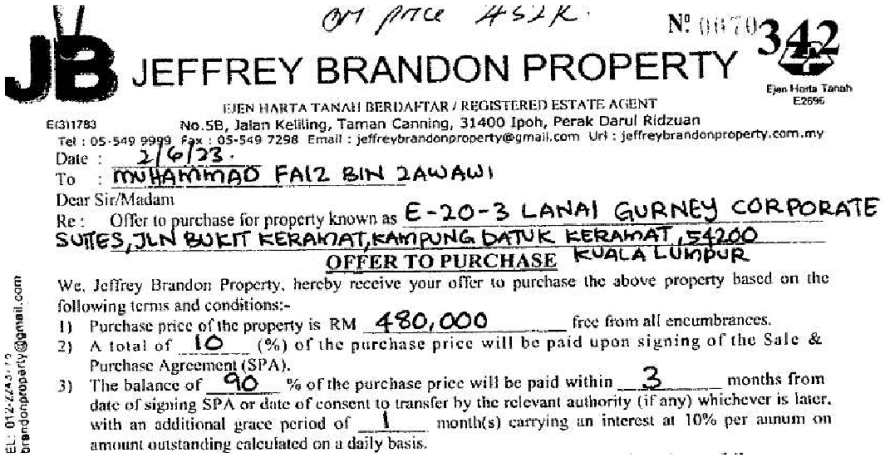
LANAI GURNEY CORPORATE SUITES

NO.	UNIT NO.	PURCHASE PRICE (JBP)	SELLING PRICE (RHBT)	UPGRADE & RENOVATION COST
20	E-20-3	480,000.00	280,018.79	199,981.21

H

[37] Evidence that the sale price agreed to be paid by the purchaser is RM480,000 can be seen from the following screenshot of the sale document signed by the purchaser of unit E-20–3. Yet, the respondent had agreed for the Trust to be receiving only RM280,018.79 and for the property agent to be paid I

RM199,981.21 as 'Upgrade and Renovation Cost'.



OM price 452K

No: 00170342

JEFFREY BRANDON PROPERTY

EJEN HARTA TANAH BERDAFTAR / REGISTERED ESTATE AGENT

Ejen Harta Tanah E2696

EG01783 No.5B, Jalan Keliling, Taman Canning, 31400 Ipoh, Perak Darul Ridzuan

Tel : 05-549 9999 Fax : 05-549 7298 Email : jeffreybrandonproperty@gmail.com Url : jeffreybrandonproperty.com.my

Date : 2/6/23.

To : MUHAMMAD FAIZ BIN ZAWAWI

Dear Sir/Madam

Re : Offer to purchase for property known as E-20-3 LANAI GURNEY CORPORATE SUITES, JLN BUKIT KERAMAT, KAMPUNG DATUK KERAMAT, 54200 KUALA LUMPUR

OFFER TO PURCHASE

We, Jeffrey Brandon Property, hereby receive your offer to purchase the above property based on the following terms and conditions:-

1) Purchase price of the property is RM 480,000 free from all encumbrances.
2) A total of 10 (%) of the purchase price will be paid upon signing of the Sale & Purchase Agreement (SPA).
3) The balance of 90 % of the purchase price will be paid within 3 months from date of signing SPA or date of consent to transfer by the relevant authority (if any) whichever is later, with an additional grace period of 1 month(s) carrying an interest at 10% per annum on amount outstanding calculated on a daily basis.

brandonproperty@gmail.com

[38] Even though the respondent had subsequently filed an ex parte application to amend the impugned order and to remove the property agent's name after this action was filed by the applicants (who are the beneficiaries), the respondent's credibility as professional trustee for the Trust has been irreversibly damaged. This is due to the act of the two senior employees of the respondent who knowingly signed at the bottom of the property agent's letter to signify the respondent's unequivocal acceptance of the terms — which included the paying of 'Upgrade and Renovation Costs' which added to *RM7,624,347.45*.

[39] The said term to agree to pay the property agent such a massive sum was wholly unjustifiable and pointed to a clear intention to deplete the assets of the Trust. It was a breach of the respondent's fiduciary duty to protect the Trust. *There is no room for the respondent to deny* because the signatures and rubber stamp of the respondent's senior employees are imprinted at the bottom of the property agent's letter, as shown in the screenshot below:

I/We, the registered/benefical owners/trustees/Power of Attorney holder of the above said Properties hereby confirm the appointment to JEFFREY BRANDON PROPERTY based on the term and conditions as set out herein.

Signature	:	Witness by	: .....
Name	: TONY CHIEW SIONG WAH	Name	: NATRA ADIBAH BINTI NUBLI
NRIC No. /	: 730503-13-5227	NRIC No.	: 921130-14-5854
Co. Chop	: ..... RHB TRUSTEES BERHAD (157301-U) Level 11, Tower Three, RHB Centre, Jalan Tun Razak, 50400 Kuala Lumpur, Malaysia.		: .....
Date	:	Date	: 26/01/2024
Signature	:	Witness by	: .....
Name	: MOHD SOFIAN BIN KAMARUDDIN	Name	: NATRA ADIBAH BINTI NUBLI
NRIC No. /	: 710311-05-5013 RHB TRUSTEES BERHAD (157301-U) Level 11, Tower Three, RHB Centre, Jalan Tun Razak, 50400 Kuala Lumpur, Malaysia.	NRIC No.	: 921130-14-5854
Co. Chop	:		: .....
			: 26/01/2024

[40] From a reading of the impugned order dated 20 June 2023 and Annexure A of the property agent's letter, I reiterate my finding that the respondent had planned it from the outset to appoint the property agent and to pay him a large percentage of the actual sale price purportedly as 'Upgrade and Renovation Costs'. The screenshot of the relevant part of the impugned order states:

DI HADAPAN HAKIM
NIK HASMAT BINTI NIK MOHAMAD
PADA 20 JUN 2023

DALAM KAMAR
MELALUI PLATFORM
SIDANG VIDEO SECARA ZOOM

PERINTAH
(Lampiran 1)

ATAS PERMOHONAN Pemohon yang dinamakan di atas yang ditetapkan untuk pendengaran pada hari ini **DAN SETELAH MEMBACA** Saman Pemula (ex-parte) bertarikh 23 Mei 2023 dan Afidavit-Afidavit yang kesemuanya difailkan di sini **DAN**

SETELAH MENDENGAR Erica Sree peguamcara bagi pihak Pemohon **MAKA ADALAH DIPERINTAHKAN** bahawa:-

(e) Jumlah lebihan harga jual yang dipersetujui bagi Kesemua 57 Unit Kondominium tersebut adalah untuk menampung kos Kerja-kerja Pembaikian dan Penyelenggaraan tersebut dan akan di keluarkan dan dibayar kepada ejen hartanah berlesen yang dilantik iaitu Tetuan Jeffrey Brandon Property E(3) 1783 yang beralamat di No. 22 Jalan SS 22/7, Damansara Jaya, 47400 Petaling Jaya, Selangor (selepas ini disebut sebagai "**Ejen Hartanah tersebut**") dimana Ejen Hartanah tersebut dan/atau kontraktornya akan meneruskan dengan Kerja-kerja Pembaikan dan Penyelenggaraan tersebut apabila Pemohon sudah menerima keseluruhan Harga jual tersebut menurut terma-terma Perjanjian Jual Beli yang ditandatangani oleh Pemohon dan bakal pembeli.

[41] Since the impugned order was obtained by way of an ex parte application, it may be set aside pursuant to O 32 r 6 of the Rules of Court 2012. The court's power to set aside ex parte orders is necessary because often times, applicants abuse the court process by filing ex parte applications and mislead the court into granting orders that would not have been made if the other parties had been heard. Order 32 r 6 simply states:

> The Court may set aside an order made *ex parte*

[42] I find that O 42 r 13 of the Rules of Court 2012 is inapplicable here to limit the time for the applicants to apply to set aside the impugned order because it was never served on the applicants. Upon conducting a file search, the applicants' solicitors had lost no time in seeing to the applicants filing this action to protect their interest. For convenient reference, I set out the wording of O 42 r 13, as follows:

> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, *a party intending to set aside* or to vary such order or judgment *shall make an application to the Court* and serve it on the party who has obtained the order or judgment *within thirty days after the receipt of the order or judgment by him*.

[43] Suriyadi FCJ (as he then was) writing for the Federal Court in *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457 made it abundantly clear that an ex parte order may be set aside pursuant to O 32 r 6 or under the inherent jurisdiction of the court. His Lordship (as he then was) opined as follows:

> *Jurisdictionally, a court under O 32 r 6 of the RHC or under O 92 of the RHC, may set aside any ex parte order*. In *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee)* [1990] 1 MLJ 445 at pp 446–447, VC George J held that the court could even set aside an ex parte final order pursuant to O 32 r 6 of the RHC. This provision has general application to general applications and proceedings in chambers, and unless there were specific rules elsewhere that do away with the said rules of general application, it was applicable in an ex parte garnishment proceedings. In fact VC George J had no hesitation in holding that *even if O 32 r 6 were inapplicable the court still was equipped with inherent jurisdiction to prevent injustice*.

[44] In *PECD Bhd & Anor v AmTrustee Bhd and other appeals* [2010] 5 MLJ 357, the Court of Appeal decided that failure to make full and frank disclosure in an ex parte application is sufficient grounds for the ex parte order to be set aside. It was held as follows:

> [27] I am in agreement with decision of the learned judge on this issue. What transpired in the first OS at the High Court, and the decision of the Court of Appeal in respect of the appeal therefrom, were certainly material facts which should have been disclosed by the appellants in applying for the ex parte order in the second OS. ... *The failure to make such full and frank disclosure renders the ex parte order obtained liable, and rightly, set aside*.

[45] Applying the ratio of *Malaysian International Trading Corp Sdn Bhd* and *PECD Bhd* to this court's finding that the respondent, through its employees, was acting in breach of its fiduciary duties in its conduct of the 57 condos which are trust properties and attempting to use the impugned order to ratify its breaches, it is clear that the impugned order (and its amended version too) ought to be set aside.

[46] The above authorities are sufficient to justify setting aside the impugned order as it is *an ex parte order*. For completeness, I am of the view that had it been an order obtained after an inter parte hearing — without full disclosure of the scheme of paying a large percentage of sale price to the property agent as 'Upgrade and Renovation Costs' — it would also be legally justified to set it aside. There are two authorities relevant to this additional point.

[47] 80 years ago, in *Cheah Wong Nyan and Cheah Sin Kee v Kalrm Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean*

Guan a bankrupt [1935] 1 MLJ 31, Whitley J had occasion to consider and decided that the court has the jurisdiction to set aside a judgment obtained by fraud. The learned judge held that the proper remedy is to bring a fresh action and not to seek a rehearing. His Lordship found in favour of the beneficiaries who applied to set aside the impugned judgment. The relevant parts of his judgment are as follows:

> The Court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a rehearing. ... One of the earliest pronouncements of this principle was made by Lord Coke in the *Duchess of Kingston*'s case (1776) 2 Sm LC 12th Ed at p 762 where he observed that acts of the highest judicial authority though not to be impeached from within yet are impeachable from without for although it is not permitted to show that the court was mistaken it may be shown that they were misled. 'Fraud is an intrinsic collateral act which vitiates the most solemn proceedings of courts of justice. It avoids all judicial acts, ecclesiastical or temporal.'
>
> ... In the present case I am satisfied that the judgment was obtained by collusion between the parties, *by a fraud on the Court in concealing the true position of affairs and by secrecy in obtaining the judgment behind the backs of those whom the parties knew to be vitally interested namely the beneficiaries*.

[48] The now 80 years old judgment of Whitley J in *Cheah Lean Guan (a bankrupt) v Kalrm Palaniappa* was affirmed 71 years later by the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1 where it was reiterated that a judgment obtained by fraud may be impeached and set aside in a fresh action. It was held as follows:

> The respondents' action in the present case is to impeach or set aside the earlier judgment which was obtained by the appellant against the respondents at the Kuantan High Court on 25 July 2007 on the ground of fraud and/or perjury committed by the appellant's witness during that earlier trial. The claim is by way of a fresh action based on fresh evidence which could not have been obtained at the earlier trial.
>
> The law recognises this type of cause of action. *Section 44* of the Act provides that 'Any party to a suit or other proceeding may show that *any judgment*, order or decree which is relevant under ss 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained *by fraud* or collusion'. This provision is an exception to the doctrine of res judicata as provided for under s 40 of the same Act.
>
> *The impeachment action must be by way a fresh action, not in the same action where the impugned earlier judgment was made. As early as 1935, Whitley J in the Penang High Court case of Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean Guan a bankrupt* [1935] 1 MLJ 31, relying on *English authorities of Cole v Langford* [1898] 2 QB 36; *Priestman v Thomas* [1884] 9 PD 270; *Duches of Kingston*'s case 2 Smith LC (13th Ed) 644 and *Patch v Ward* (1867) LR 3 Ch App 203 ruled that, 'The court undoubtedly has

jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a re-hearing'.

[49] Based on this court's above finding of facts that the respondent had planned from the outset to appoint the property agent as the sole agent and to pay him more than RM7.6m out of the sale price purportedly as 'Upgrade and Renovation Costs', I find that the applicants have also satisfied the legal requirements for the setting aside of an inter parte order on the ground of intention to defraud and deplete the trust assets — as evidenced by the contents of the impugned order (see para 40 above) and the contents of Annexure A of the property agent's letter (see paras 33 and 36 above) which was unequivocally agreed by the respondent. The 'Upgrade and Renovation Costs' scheme was a sham.

[50] Lastly, whilst it is true that cl 7.3 of the deed of trust does mention that the trustee is empowered to sell trust properties, it is not an unfettered power. Clause 7.3 must be read with trite law that a trustee is a fiduciary who must always act in the best interest of the beneficiaries. As the finding of facts made above have shown that the respondent had acted with serious lack of probity, it is not open to the respondent — which is a trust company appointed by the court to be trustee of the Trust — to callously point its finger at cl 7.3 and claim to have unfettered power to sell trust properties at a great loss to the beneficiaries of the Trust.

CONCLUSION

[51] Based on the finding of facts stated above, there are in fact sufficient grounds for the applicants to seek an order to remove the respondent as trustee of the Trust. However, since it is not specifically prayed for, this court would not resort to the omnibus prayer to issue such an order. The applicants' prayer for the setting aside of the impugned order dated 20 June 2023 in OS No 1904 is allowed. Logically, it follows that its amended version is set aside too.

[52] Lastly, consequential orders are necessary since the sham 'Upgrade and Renovation Costs' scheme has proven that the respondent could not be trusted to sell the 57 condos by way of private treaty or through any property agent. The way forward is for this court to order that any sale of the 57 condos must be conducted by way of public auction or open tender at market price, under the supervision of solicitors and a property valuer with the assistance of licensed estate agents to market those properties; to ensure transparency and the best sale price is obtained for the benefit of the beneficiaries. A final note: in the applicants' prayer in the originating summons, 'estate agent' was erroneously translated as 'ejen harta pusaka' when it should be 'ejen harta tanah'. This error

A is inconsequential and may be corrected under the slip rule in O 20 r 11 of the Rules of Court 2012.

Impugned order for sale set aside.

B Reported by Ashok Kumar

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